Nos. 24-394 and 24-396

In the Supreme Court of the United States

OKLAHOMA STATEWIDE CHARTER SCHOOL BOARD, et al.,
Petitioners,

v.

GENTNER DRUMMOND, Attorney General of Oklahoma, ex rel. OKLAHOMA,
Respondent.

ST. ISIDORE OF SEVILLE CATHOLIC VIRTUAL SCHOOL,
Petitioner,

v.

GENTNER DRUMMOND, Attorney General of Oklahoma, ex rel. OKLAHOMA,
Respondent.

On Writs of Certiorari to the Oklahoma Supreme Court

BRIEF OF OKLAHOMA PARENT LEGISLATIVE ADVOCACY COALITION AND OKLAHOMA PARENTS, EDUCATORS, CLERGY, AND TAXPAYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are Oklahoma public-school parents, educators, public-education advocates, clergy, and taxpayers. They are committed supporters of public schools and religious freedom, and they oppose the use of their tax dollars to establish and fund a religious public school—petitioner St. Isidore of Seville Catholic Virtual School. They are also plaintiffs in a related lawsuit that challenges the establishment and proposed state funding of St. Isidore under Oklahoma law, *OKPLAC, Inc.* v. *Oklahoma Statewide Charter School Board*, No. CV-2023-1857 (Okla. Cnty. Dist. Ct. 2023).

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to fund the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners seek to establish a religious governmental entity. There is no clearer Establishment Clause violation than this.

Oklahoma virtual charter schools are governmental entities. They are created by and can be dissolved by governmental action, are controlled by governmental officials, pursue governmental objectives, are governed by extensive statutory mandates, are fully state-funded, have numerous other characteristics of governmental entities, and are defined as public schools and governmental entities by state law. And even if they were not governmental entities, they would still qualify as state actors under other criteria developed by this Court.

As governmental entities, Oklahoma virtual charter schools do not have Free Exercise Clause rights to challenge the very laws that create them. But even if St. Isidore could do so, it must—as a governmental entity or other state actor—comply with the U.S. Constitution. And the Constitution's Establishment Clause, which the Free Exercise Clause cannot override, prohibits St. Isidore from operating as a religious public charter school.

This Court has long recognized that the Establishment Clause bars governmental entities from establishing religious bodies, from fusing governmental and religious functions, and from delegating governmental authority to religious entities. The Court also has long held that the Establishment Clause prohibits public schools from inculcating a particular faith in their students. These longstanding principles are rooted in the Founders' understandings that religion

is a matter of personal conscience, and that the lessons of history have demonstrated that governmental efforts to control or influence religious belief lead to religious strife and oppression.

The Oklahoma Supreme Court's judgment should be affirmed.

ARGUMENT

I. As a public charter school, St. Isidore is a governmental entity or other state actor.

To assert the protections of the Free Exercise Clause and evade the prohibitions of the Establishment Clause, petitioners attempt to paint St. Isidore—a public charter school—as a private entity that is not engaged in any state action. But Oklahoma virtual charter schools are governmental entities, so they are inherently state actors. And even if they are not governmental entities, they are still state actors under at least two state-action tests that apply to otherwise private entities.

A. Like all other Oklahoma virtual charter schools, St. Isidore is a state actor because it is a governmental entity.

Governmental entities are inherently state actors. See, *e.g.*, *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378, 383, 400 (1995). As this Court recently noted, in cases involving governmental employees or entities, "state action is easy to spot." *Lindke* v. *Freed*, 601 U.S. 187, 195 (2024). "Courts do not ordinarily pause to consider whether [the Constitution] applies to the actions of police officers, public schools, or prison officials." *Ibid.*

Thus, to determine whether a party is a state actor, this Court first considers whether the party is a

governmental entity; if it is, there is no need to consider state-action tests applicable to private parties. For example, in *Lebron*, 513 U.S. at 378, 400, the Court held that Amtrak "is part of the Government for purposes of the First Amendment," and that it was therefore "unnecessary to traverse th[e] difficult terrain" of determining when the acts of private entities can be regarded as state action.

The Court explained in *Lebron* that Amtrak was created by legislation, that it is controlled by government-appointed officials, and that its purpose is to pursue governmental objectives. 513 U.S. at 383–386, 391, 397–400. The Court reaffirmed that Amtrak is a governmental entity in *Department of Transportation* v. *Ass'n of American Railroads*, 575 U.S. 43, 52–53 (2015), pointing to these and additional considerations, including that "Congress has mandated certain aspects of Amtrak's day-to-day operations," that Amtrak is "dependent on federal financial support," that Amtrak must provide annual reports on certain matters to Congress and the President, and that Amtrak has other characteristics of governmental entities, such as being subject to the Freedom of Information Act. Similarly, in *Biden* v. *Nebraska*, 600 U.S. 477, 491 (2023), the Court held that the Missouri Higher Education Loan Authority (MOHELA) was a governmental entity because "[i]t was created by the State to further a public purpose, is governed by state officials and state appointees, reports to the State, and may be dissolved by the State." In addition, then-Judge Gorsuch applied this kind of analysis for the Tenth Circuit in *United States* v. *Ackerman*, concluding that a clearinghouse for missing children was a governmental entity because it was given exclusive duties and powers by a federal statute, was funded

primarily by the federal government, and "is statutorily required to perform over a dozen separate functions, a fact that evinces the sort of 'day-to-day' statutory control over its operations that the Court found tellingly present in the Amtrak cases." 831 F.3d 1292, 1295–1300 (10th Cir. 2016) (quoting *Ass'n of Am. R.Rs.*, 575 U.S. at 53).

Oklahoma virtual charter schools have the same characteristics that led this Court to hold that Amtrak and MOHELA are governmental entities. The schools are created by governmental action. They can be dissolved by governmental action. They are controlled by governmental officials. They are charged with pursuing governmental objectives. They are subject to extensive statutory mandates that direct their day-to-day operations. They are fully funded by the government. They must report on their operations to the government. And they have many other attributes of governmental entities. What is more, while this Court held that Amtrak is a governmental entity notwithstanding that a statute professed that it wasn't (see *Lebron*, 513 U.S. at 391–392), Oklahoma virtual charter schools are defined and designated as public schools and governmental entities under state law, so this case should be an easier one than the Amtrak cases were.

Created by governmental action. Governmental action is responsible for the creation of Oklahoma virtual charter schools in two respects. First, virtual charter schools were authorized by the Oklahoma legislature through the Oklahoma Charter Schools Act,

Okla. Stat. tit. 70, §§ 3-130 *et seq.*[2] Second, an individual virtual charter school can come into existence only if the Oklahoma Statewide Charter School Board—a governmental entity—approves a detailed application for a charter for the school. Okla. Stat. tit. 70, §§ 3-132.1(A), 3-132.1(I), 3-134(B), 3-134(I). The application process requires the Charter Board to assess the quality of the application by considering thirty-five statutorily enumerated categories of information submitted by the applicant, including a mission statement, a financial plan, hiring policies, academic programs, an organizational chart, governing bylaws, and specific individuals responsible for startup tasks. *Id.* § 3-134(B).

Subject to dissolution by government. Oklahoma virtual charter schools can be dissolved by governmental action as well. They may be abolished in their entirety by repeal of the Charter Schools Act. And the Charter Board may deny renewal of or terminate an individual school's charter for poor performance or other good cause. Okla. Stat. tit. 70, § 3-137(D)–(F).

Controlled by governmental officials. Throughout their existence, Oklahoma virtual charter schools remain under the control of superior governmental officials. The Charter Board must provide "oversight of the operations of * * * virtual charter schools in the state through annual performance reviews and reauthorization." *Id.* § 134(I)(1). It must "approve or deny proposed contracts between the governing board of a * * * virtual charter school and an

[2] All citations to Oklahoma statutes and regulations are to the current versions.

educational management organization" (*id.* § 134(I)(6)), which is a "for-profit or nonprofit organization that receives public funds to provide administration and management services" for public schools (*id.* § 5-200(A)). And the Charter Board must monitor "the performance and legal compliance of * * * virtual charter schools." *Id.* § 134(I)(7).

Moreover, the Charter Board is not the only superior governmental entity that exercises control over virtual charter schools in Oklahoma. The schools must submit annual accreditation applications to the Oklahoma State Department of Education. Okla. Admin. Code § 210:35-3-201(a). The Charter Schools Act also requires the Oklahoma State Board of Education to "identify * * * virtual charter schools in the state that are ranked in the bottom five percent (5%) of all public schools as determined pursuant" to a statutory formula, and virtual charter schools that are so ranked over a three-year period are subject to closure. Okla. Stat. tit. 70, § 3-137(H) (citing *id.* § 1210.545).

Pursue governmental objectives. Oklahoma virtual charter schools are charged by statute with fulfilling governmental objectives—including effectuating an Oklahoma constitutional mandate that the state provide free education that is open to all. See Okla. Const. Art. I, § 5; Art. XI, §§ 2 and 3; Art. XIII, § 1; Okla. Stat. tit. 70, § 3-131(A). To that end, the Charter Schools Act requires virtual charter schools to "be as equally free and open to all students as traditional public schools." Okla. Stat. tit. 70, § 3-136(A)(9). Thus, the Act prohibits virtual charter schools from "charg[ing] tuition or fees." *Ibid.* Further, the Act requires that a lottery be used to select which students may enroll in a charter school if the number

of students applying exceeds the space available, and the Act prohibits admission preferences other than geographic ones. *Id.* § 3-140(A) and (D).

Directed by statutory mandates. Oklahoma exercises significant control over virtual charter schools' day-to-day operations through extensive statutory requirements that do not apply (see generally Okla. Admin. Code § 210:35-33-2) to private schools. For example, Oklahoma virtual charter schools must establish "academic program[s] aligned with state standards" (Okla. Stat. tit. 70, § 3-134(B)(12)) and must adhere to certain curricular requirements and prohibitions that are applicable to other public schools (*id.* §§ 11-103.6m(C), 11-103.16, 24-157(B)(1), 1210.508B(D)). They must "comply with all * * * laws relating to the education of children with disabilities in the same manner as a school district." *Id.* § 3-136(A)(6). They must follow the same rules that govern other public schools on school-year length (*id.* §§ 3-136(A)(10), 1-109(A)), bus transportation (*id.* §§ 3-141(A), 9-101(C)), student testing (*id.* §§ 3-136(A)(4), 1210.508(F), 1210.508-5), student suspension (*id.* §§ 3-136(A)(11), 24-101.3), school libraries (*id.* § 11-202), electronic communication with students (*id.* § 6-401), provision of health-related information (*id.* §§ 24-100.10(A), 1210.196(B)), college financial-aid applications (*id.* § 1210.508-6), and insurance coverage and fidelity bonding (Okla. Admin. Code § 210:40-87-6(a)–(b)). See also *supra* at 7; *infra* at 8–9.

Fully funded by the state. Oklahoma provides full state funding for virtual charter schools. They are funded in accordance with the same statutory formulas as traditional public schools. Okla. Stat. tit. 70, §§ 3-142(A), 3-142(C), 18-200.1, 18-201.1.

Mandatory reporting requirements. Oklahoma virtual charter schools must submit to the Charter Board detailed annual reports that cover "student academic proficiency," "student academic growth," "achievement gaps in both proficiency and growth between major student subgroups," "student attendance," "recurrent enrollment from year to year," high-school graduation rates, "postsecondary readiness," "financial performance and sustainability and compliance with state and Internal Revenue Service financial reporting requirements," "audit findings or deficiencies," "accreditation and timely reporting," "governing board performance and stewardship," and "mobility of student population." Okla. Stat. tit. 70, § 3-136(A)(18); see also *id.* § 3-136(A)(17). They also must comply with all other "reporting requirements" that apply to public "school district[s]." *Id.* § 3-136(A)(5). For example, they must report student test results in the same manner "as is required of a school district." *Id.* § 3-136(A)(4).

Other attributes of governmental entities. Oklahoma virtual charter schools are similar to other governmental entities in many additional respects. Like other governmental entities, they must "comply with the Oklahoma Open Meeting Act and the Oklahoma Open Records Act." Okla. Stat. tit. 70, § 3-136(A)(15). They must have governing boards that hold public meetings in at least ten months of the year. *Id.* §§ 3-134(B)(33), 3-136(A)(7). Governing board members are "subject to the same conflict of interest requirements" and "continuing education requirements" as members of local school boards. *Id.* § 3-136(A)(7).

Oklahoma virtual charter schools are also "eligible to receive current government lease rates" if they choose to lease property. Okla. Stat. tit. 70, § 3-142(F). Their employees are eligible for the same retirement benefits that Oklahoma provides to teachers at other public schools (*id.* § 3-136(A)(13)) and for the same insurance programs that are available to employees of a traditional public-school district (*id.* § 3-136(A)(14)). And Oklahoma virtual charter schools are "considered * * * school district[s] for purposes of tort liability under The Governmental Tort Claims Act." *Id.* § 3-136(A)(12).

Defined as public schools and governmental entities. While there are numerous similarities between Oklahoma virtual charter schools and the entities held to be governmental in *Lebron* and *Ackerman*, there is one major difference between them, which should make this case a far easier one than those cases were. The courts concluded that the entities in those cases were governmental even though Amtrak was defined by statute as a for-profit corporation and not "an agency or establishment of the United States government" (*Lebron*, 513 U.S. at 385, 391) and the agency in *Ackerman* was a nonprofit corporation (831 F.3d at 1295). By contrast, Oklahoma virtual charter schools are defined as governmental entities under state law, both by statute and through judicial opinions.

The Oklahoma Charter Schools Act defines "charter school" as "a public school established by contract." Okla. Stat. tit. 70, § 3-132.2(C)(1)(b). Furthermore, each Oklahoma virtual charter school is considered to be a separate "local education agency" (*id.* § 3-142(D)), which is "a public board of education or other public

authority legally constituted" for "administrative control or direction" of public schools (see 20 U.S.C. 7801(30)(A)). The Oklahoma Judicial Ethics Advisory Panel treats service on the board of an Oklahoma charter school as an "appointment to a governmental committee, board, commission, or other governmental position." Okla. Jud. Ethics Op. 2023-3, 538 P.3d 572, 572 (Okla. Jud. Ethics Advisory Panel 2023) (quoting Okla. Code Jud. Conduct R. 3.4). A 2007 Oklahoma Attorney General opinion states that "[t]he charter school program is part of the public education system" and that charter schools are "under the control of the Legislature" and further the Legislature's "mandate of establishing and maintaining a system of free public education." Hon. Al. McAffrey, Okla. Op. Att'y Gen. No. 07-23, 2007 WL 2569195, at *6–7 (2007). And, of course, the Oklahoma Supreme Court concluded below that Oklahoma virtual charter schools are governmental entities as a matter of state law. Pet. App. 17a–19a.

To be sure, in determining whether an entity is governmental for federal constitutional purposes, how the entity is defined by statute cannot override the substance of what the entity is. See *Lebron*, 513 U.S. at 392–393, 397; see also *Board of Cnty. Comm'rs* v. *Umbehr*, 518 U.S. 668, 679–680 (1996). Nevertheless, this Court has accorded considerable weight to how a state defines an entity. See *Biden*, 600 U.S. at 490–491 (emphasizing that MOHELA was statutorily defined as a "public instrumentality" and concluding that MOHELA was governmental both "[b]y law and function"); *Arkansas* v. *Texas*, 346 U.S. 368, 370 & nn.7–9 (1953) (relying on state judicial opinions that held that University of Arkansas was state entity, together with factors similar to those used in Amtrak

cases, to conclude that University was governmental); see also *Lindke*, 601 U.S. at 195 ("Courts do not ordinarily pause to consider whether [the Constitution] applies to the actions of * * * public schools."); *Regents of Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429 n.5 (1997) (holding that a state agency's status under the Eleventh Amendment "is a question of federal law" that "can be answered only after considering the provisions of state law that define the agency's character"). Here, the substance and the definition both lead to the same conclusion: Oklahoma virtual charter schools are governmental entities.

In these respects, Oklahoma virtual charter schools are similar to public universities and public hospitals, which are not only labeled as "public" but also are created by governmental action, are overseen by governmental officials, are charged with pursuing governmental objectives, are funded by taxes, and have various other governmental characteristics. See Okla. Stat. tit. 70, §§ 3206, 3301–3302, 3901 (describing the creation, funding, and governance of the University of Oklahoma); Okla. Stat. tit. 63, § 3203 (describing the purpose and structure of the Oklahoma university hospital system). Public universities and public hospitals are, of course, readily recognized as government-entity state actors. See *NCAA* v. *Tarkanian*, 488 U.S. 179, 192 (1988) ("A state university without question is a state actor."); *Matrix Distributors, Inc.* v. *National Ass'n of Bds. of Pharmacy*, 34 F.4th 190, 195 (3d Cir. 2022) (confirming that "a public entity (like a state university)" is a "classic" example of a state actor); *Hayut* v. *State Univ. of N.Y.*, 352 F.3d 733, 744 (2d Cir. 2003) ("We think it clear that a professor employed at a state university is a state actor."); *Chudacoff* v. *University Med. Ctr. of S. Nev.*, 649

F.3d 1143, 1150 (9th Cir. 2011) ("[T]here is no dispute that the operation of [a public] hospital is state action[.]" (quoting *Woodbury* v. *McKinnon*, 447 F.2d 839, 842 (5th Cir. 1971)); *Briscoe* v. *Bock*, 540 F.2d 392, 394–395 (8th Cir. 1976) ("There is no question that * * * those in charge of the affairs of a public hospital * * * must conform to * * * the fourteenth amendment.").

Petitioners contend that there are three cases in which this Court concluded that entities or persons labeled as "public" were not engaged in state action: *Manhattan Community Access Corp.* v. *Halleck*, 587 U.S. 802, 805 (2019); *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 350 n.7 (1974); and *Polk County* v. *Dodson*, 454 U.S. 312, 317–320 (1981). See St. Isidore Br. 32; see also Board Br. 26–27. But the entity at issue in *Halleck* was not even labeled "public"—it was a private nonprofit corporation that merely operated a public-access cable channel (587 U.S. at 805); and the entity at issue in *Jackson* was a "privately owned and operated" utility company (419 U.S. at 350). Neither entity was defined under state law as governmental, and neither had any substantive attributes of governmental entities. See *Halleck*, 587 U.S. at 805, 809–811 & n.1; *Jackson*, 419 U.S. at 350–353. And in *Polk*, the Court concluded that public defenders are not state actors when acting as counsel in a criminal proceeding, because they are acting as adversaries to the state in that role. See 454 U.S. at 318–320, 325. Oklahoma virtual charter schools, on the other hand, are defined as governmental entities under state law, have numerous attributes of governmental entities, and do not act as adversaries to the state.

Petitioners' other arguments. None of petitioners' remaining arguments can overcome the voluminous evidence establishing that Oklahoma virtual charter schools are governmental entities.

Petitioners argue that St. Isidore is a private entity because it was originally created by private entities. Board Br. 40; St. Isidore Br. 29. But in *Ackerman*, then-Judge Gorsuch rejected a similar argument, reasoning that "an admittedly private entity can be made into a public one later." 831 F.3d at 1299. Even if the entity that submitted St. Isidore's charter application was private when it did so, once the application was approved, the entity became a governmental body (see *supra* at 5–13) (or a new governmental body—the St. Isidore charter school—was formed, see Resp't's Br. 13 n.5, 35), and the members of the entity's governing board became public officials (see Okla. Jud. Ethics Op. 2023-3, 538 P.3d at 572; Okla. Stat. tit. 70, § 3-136(A)(7)). The situation here is akin to what happens when private residents of an unincorporated community get together to organize a town in Oklahoma: The governmental entity—the town—comes into being upon electoral approval, and the persons elected to the town's board of trustees become public officials. *See* Okla. Stat. tit. 11, §§ 3-101 to 107, 12-102.

Petitioners also argue that Oklahoma virtual charter schools are not governmental entities because they are exempt from some rules that govern traditional public schools. See Board Br. 42–43; St. Isidore Br. 35. But these exemptions do not change any of the numerous above-described characteristics that render Oklahoma virtual charter schools governmental entities. See *Lebron*, 513 U.S. at 392 (Amtrak was governmental entity despite being exempted from various

legal requirements ordinarily applicable to governmental bodies).

Because Oklahoma virtual charter schools are governmental entities, there is no question that they are state actors, and this should end the inquiry. See *Lebron*, 513 U.S. at 378.

B. Alternatively, St. Isidore is a state actor under state-action tests that apply to private entities.

Even if Oklahoma virtual charter schools are not governmental entities, they are still state actors. In some circumstances, the conduct of private entities "may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351. These circumstances include "when the private entity performs a traditional, exclusive public function" and "when the government has outsourced one of its constitutional obligations to a private entity." *Halleck*, 587 U.S. at 809, 810 n.1; see also *West* v. *Atkins*, 487 U.S. 42, 56 (1988). Oklahoma virtual charter schools are state actors under both of these tests.

1. St. Isidore is a state actor because it performs a traditional, exclusive public function.

A private entity is a state actor when it exercises a function "traditionally *and* exclusively performed" by the government. *Halleck*, 587 U.S. at 809. Oklahoma virtual charter schools perform the traditional, exclusive public function of providing education that is "*free* and *open to all students*." Okla. Stat. tit. 70, § 3-136(A)(9) (emphasis added).

When analyzing a state-level function such as the one at issue here, this Court has looked primarily to

statewide traditions and history. See *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 842 (1982); *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 57 (1999). The Court has also sometimes situated its state historical analysis within broader, nationwide traditions. See, *e.g.*, *Halleck*, 587 U.S. at 810–811 (citing local and nationwide historical sources). The tradition at issue must be well established. See *Rendell-Baker*, 457 U.S. at 842; *Evans* v. *Newton*, 382 U.S. 296, 301 (1966).

That is the case here. In Oklahoma, the provision of education that is free and open to all has been an exclusively public function since the state came into existence. Prior to Oklahoma statehood in 1907, schools in the region generally fell into three categories: subscription schools, mission schools, and schools operated by Indigenous nations and reservations. Dianna Everett, *The Encyclopedia of Oklahoma History and Culture: Schools, Common*, Okla. Hist. Soc'y, https://perma.cc/544H-RJH8. These schools were not free and open to all. Subscription schools relied on funding from pupils' parents. *Ibid.* Mission schools and those operated by Indigenous people generally served only Indigenous pupils. See Oscar William Davison, *Oklahoma's Educational Heritage*, 27 Chrons. Okla. 354, 362–365 (1949). In the years following the Civil War, the children of white settlers were sometimes allowed to attend these schools, but they were required to pay tuition. *Id.* at 365.

Under this hodgepodge educational arrangement, many children did not have access to educational facilities. Everett, Okla. Hist. Soc'y. During the Oklahoma Territory period (1890–1907), school enrollment grew as the territorial government appropriated funds for public schools. See Davison, 27 Chrons.

Okla. at 367; Everett, Okla. Hist. Soc'y. But it was the adoption of the state constitution in 1907 that fully committed Oklahoma to the provision of education that is free and open to all: Section 5 of Article I of the Oklahoma Constitution required that "[p]rovisions shall be made for the establishment and maintenance of a system of public schools, which shall be *open to all* the children of the state"; and Section 1 of Article XIII required that "[t]he Legislature shall establish and maintain a system of *free* public schools wherein *all* the children of the State may be educated." (Emphases added.)

Indeed, the Charter Schools Act's mandate that charter schools be "free and open to all students" (Okla. Stat. tit. 70, § 3-136(A)(9)) quotes directly from these 1907 Oklahoma constitutional clauses, which remain in place today. Following the enactment of the 1907 Constitution, education expanded rapidly in Oklahoma. According to the state's first superintendent of public instruction, Oklahoma enrolled in 1908 "not less than 140,000 children who never entered a public schoolhouse before and a vast majority of whom never attended a school of any kind a single day." Everett, Okla. Hist. Soc'y. Oklahoma public schools had done what private education simply could not: provide a system of free education for all children.

Oklahoma's experience mirrors that of states across the union, where "tax support was a necessary condition for a free school system." Carl F. Kaestle, Pillars of the Republic: Common Schools and American Society, 1780–1860 at 151 (Eric Foner, ed., 1983) (Kaestle). When our nation was founded, several state constitutions mandated *some* state support for education. See, *e.g.*, Mass. Const. of 1780, Ch. 5, § 2 ("[I]t shall be the duty of legislatures and magistrates * * *

to cherish the interests of * * * public schools and grammar schools in the towns."); see generally Derek W. Black, *Localism, Pretext, and the Color of School Dollars*, 107 Minn. L. Rev. 1415, 1448–1449 (2023). But in the early days of the Republic, schools were generally "a product of private action" and were "not open to all, free, or part of some formal system of schools." Black, 107 Minn. L. Rev. at 1450. Early schools "depended heavily on tuition," and "many communities had no schools at all." *Ibid.*

This changed with the advent of the "common schools" movement, which transformed education in the North in the 1820s and 1830s and in the South after the Civil War. Black, 107 Minn. L. Rev. at 1450–1451. Common schools "fell under the purview of public officials" and were "funded by state and local taxes designated precisely for them." *Id.* at 1451. Soon states "began abolishing tuition and fees in common schools," and many states mandated "free" education for "all" in their state constitutions. *Id.* at 1457–1458; see, *e.g.*, Ga. Const. of 1868, Art. VI, § 1 (mandating that public education "be forever free to all Children of the State").

The phrase "open to all" traces its origins to a proposed amendment to the Reconstruction Act of 1867, introduced by Senator Charles Sumner, which would have required readmitted states "to establish and sustain a system of public schools open to all, without distinction of race or color." See Cong. Globe, 40th Cong., 1st Sess. 165 (1867) (statement of Sen. Sumner). While this amendment failed by a narrow margin, Sumner's proposed language "would make its way into all of the education clauses in the newly readmitted states' constitutions." Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70

Stan. L. Rev. 735, 780 (2018). During Reconstruction Era state constitutional conventions, "[v]oting and education held [a] unique position because of their centrality to a republican form of government itself." Derek W. Black, *The Fundamental Right to Education*, 94 Notre Dame L. Rev. 1059, 1090–1091 (2019). As a result of this focus on public education, nationwide school enrollment increased quickly after the Civil War. See *id.* at 1094; William C. Sonnenberg, *Elementary and Secondary Education*, *in* Nat'l Ctr. for Educ. Stat., U.S. Dep't of Educ., 120 Years of American Education: A Statistical Portrait 36 tbl. 9 (Thomas D. Snyder ed., 1993).

Public education grew in the nineteenth century because private schooling had proven to be incapable of providing a system of free education open to all. See Johann N. Neem, Democracy's Schools: The Rise of Public Education in America 67 (2017) (Neem). In some places, private charity schools offered free education "explicitly for the poor," but "traditional views" dictated that "[s]chooling should not be free for those able to pay for it." See Kaestle 60, 149. Meanwhile, the affluent sent their children to "expensive and exclusive" independent pay schools. *Id.* at 60. Assessing this class-segregated education system, lawmakers across the country concluded that "free public education in common schools was vital." Neem 67. In the words of North Carolina state senator Archibald Murphey, provision of universal education "*require[d]* a system of public education" because "private effort" had failed to accomplish that goal. *Ibid.* (emphasis added). Senator Murphey, like the Reconstruction Era state-constitution framers, grounded the importance of universal education in the "virtues" that uphold "a republic." See *ibid.* Thus, education that is free and

open to all students is a traditionally exclusive public function both in Oklahoma and nationwide.

In arguing otherwise, petitioners point to school-voucher programs. Board Br. 34; St. Isidore Br. 42. But the very purpose of these programs is to help parents pay "*tuition and fees* at a private school." Okla. Stat. tit. 70, § 28-101(A)(6) (emphasis added); see also *id.* § 13-101.2(J)(3). For example, Oklahoma offers a tax credit to reimburse private-school tuition payments. *Id.* § 28-101(A)(6). Schools that take part in this program are not free—the amount of the tax credit depends on parental income and does not guarantee full tuition coverage. See *id.* § 28-101(C)(1); Board Br. 34. Nor are the schools open to all students; instead, they can maintain discriminatory admission policies (see *id.* §§ 28-100 *et seq.*), and many do (see, *e.g.*, Grace and Truth Christian Acad., *Application*, https://perma.cc/U28Z-RNXK). The longstanding tradition of government being the exclusive provider of education that is free and open to all thus continues in the present day.

Petitioners also contend that the function the Court should analyze should just be "education," not education that is free and open to all, and they point out that the former is not a traditionally exclusive public function. See Board Br. 32–33; St. Isidore Br. 41–43. But this Court's public-function cases demonstrate that the conduct at issue must be identified with specificity instead of being defined too broadly. For example, although the government does not conduct elections for private offices, such as positions on corporate boards, running elections for *public* office is a quintessential example of a traditionally exclusive public function. See *Halleck*, 587 U.S. at 809–810 (collecting cases). Similarly, although both private and

public parks exist, trustees of public parks are considered state actors because operating a public park is a function "like [running] a fire department or police department that traditionally serves the community." See *Evans*, 382 U.S. at 302. So too is education that is "free and open to all students" (Okla. Stat. tit. 70, § 3-136(A)(9)).

2. St. Isidore is a state actor because Oklahoma has delegated one of its constitutional obligations to the school.

Even if the provision of education that is free and open to all were not a traditionally exclusive governmental function, "this Court has recognized that a private entity may * * * be deemed a state actor when the government has outsourced one of its constitutional obligations to [the] entity." *Halleck*, 587 U.S. at 810 n.1. For example, in *West*, 487 U.S. at 56, the Court held that a physician who contracted with the state to provide medical services to incarcerated individuals was a state actor even though he was not a state employee, because the state had "delegated" to the doctor "its constitutional duty to provide adequate medical treatment to those in its custody."

Several provisions of the Oklahoma Constitution obligate the state to provide free education that is open to all. See Okla. Const. Art. I, § 5; Art. XI, §§ 2 and 3; Art. XIII, § 1. Oklahoma virtual charter schools are statutorily created to perform this constitutionally mandated state duty. See Okla. Stat. tit. 70, § 3-136(A)(9). Thus, they are state actors.

Petitioners argue that the state did not delegate all responsibility for public education for the entire state to St. Isidore. Board Br. 35–36; St. Isidore Br. 45. But the state in *West* did not delegate

responsibility for all medical care in prisons across the state to a single doctor. Indeed, the state prison at issue employed both a "full-time staff physician" and contract doctors such as the respondent there. 487 U.S. at 44. A partial delegation of a constitutional duty is a delegation all the same.

Petitioners also try to distinguish *West* by pointing out that the incarcerated individual there had no choice but to "rely on prison authorities to treat his medical needs." Board Br. 36 (quoting *West*, 487 U.S. at 54); see also St. Isidore Br. 45. But the Court in *West* discussed this lack of choice only to explain why a constitutional duty existed there notwithstanding that there is no recognized, freestanding right to healthcare under the Constitution. See 487 U.S. at 54 (citing *Estelle* v. *Gamble*, 429 U.S. 97, 103 (1976)); see also Charles Pablico-Fernandez, Note, *Born to Die: Finding the Right to Healthcare in the History and Tradition of the Bill of Rights Amendments*, 57 Loy. L.A. L. Rev. 791, 816 (2024). Here, Oklahoma children enjoy an express right to access public education that is free and open to all. See Okla. Const. Art. I, § 5; *id.* Art. XIII, § 1. Oklahoma's duty to make such education available is not dependent on context.

II. Because St. Isidore is a governmental entity and a state actor, it may not assert a free-exercise challenge to state law that governs the school.

Because Oklahoma virtual charter schools are governmental entities and state actors, they have no right under the Free Exercise Clause to present programming that state constitutional provisions or statutes prohibit. Oklahoma virtual charter schools are created by state law and through charters granted by

the Charter Board—a governmental entity to which the schools are subordinate. See Okla. Stat. tit. 70, § 3-132.1(A). "[S]ubordinate unit[s] of government * * * 'ha[ve] no privileges or immunities under the federal constitution which [they] may invoke in opposition to the will of [their] creator.'" *Ysursa* v. *Pocatello Educ. Ass'n*, 555 U.S. 353, 363 (2009) (quoting *Williams* v. *Mayor of Baltimore*, 289 U.S. 36, 40 (1933)). As a subordinate governmental unit, St. Isidore is precluded from challenging Oklahoma law on free-exercise grounds under the U.S. Constitution.

In addition, when a state actor speaks in the course of exercising official duties, the speech is government speech. See, *e.g., Garcetti* v. *Ceballos*, 547 U.S. 410, 421 (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes[.]"). An entity delivering government speech has no right under the First Amendment to present speech that the law prohibits. See, *e.g., Pleasant Grove City* v. *Summum*, 555 U.S. 460, 468 (2009) ("[G]overnment speech must comport with the Establishment Clause."); *Rust* v. *Sullivan*, 500 U.S. 173, 198–199 (1991) (holding that medical staff did not have free-speech right to provide abortion counseling and referral in violation of Title X rules when carrying out duties of government-funded program).

III. Even if St. Isidore could assert free-exercise rights, Oklahoma's prohibition on religious education in public schools satisfies any level of scrutiny.

Even if St. Isidore could assert free-exercise rights, they would not override Oklahoma's

prohibition on the teaching of a religious curriculum by a public charter school, because the prohibition is necessary to comply with the federal Establishment Clause. Adherence to the federal Establishment Clause is a compelling governmental interest that satisfies any level of scrutiny under other provisions of the First Amendment. See *Capitol Square Rev. & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 761–762 (1995) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., Kennedy, J., and Thomas, J.); accord *id.* at 783 (O'Connor, J., concurring in part and concurring in the judgment, joined by two other Justices); see also *Lee* v. *Weisman*, 505 U.S. 577, 587 (1992).

The creation of St. Isidore as an Oklahoma charter school violates the Establishment Clause in two respects. First, the Establishment Clause prohibits a state agency from establishing a state religious institution, fusing governmental and religious functions, and delegating governmental authority to a religious entity. Second, the Establishment Clause bars state actors from inculcating a religion in students or otherwise promoting a religion to them.

This Court derived these Establishment Clause rules through "analysis focused on original meaning and history" that "'faithfully reflec[ted] the understanding of the Founding Fathers.'" See *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 536 (2022) (quoting *Town of Greece* v. *Galloway*, 572 U.S. 565, 577 (2014)). The "meaning and scope of the First Amendment" are best understood in light "of its history and the evils it was designed forever to suppress." *Everson* v. *Board of Educ.*, 330 U.S. 1, 14–15 (1947). As this Court has repeatedly observed, the Founders wrote the First Amendment's Religion Clauses to avoid

repeating an ugly history of persecution of religious minorities that occurred both in Europe and in the colonies. See, *e.g.*, *id.* at 8–11; *School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 214 (1963). And the Founders' vision of a country free from religious persecution coincided with their embrace of the Enlightenment ideal that religion is a matter of personal conscience, not to be influenced or directed by the government. See Steven J. Heyman, *The Light of Nature: John Locke, Natural Rights, and the Origins of American Religious Liberty*, 101 Marq. L. Rev. 705, 748–749 (2018). "The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." *Engel* v. *Vitale*, 370 U.S. 421, 431–432 (1962) (quoting James Madison, Memorial and Remonstrance against Religious Assessments (1785), https://bit.ly/2YwACub).

A. The Establishment Clause forbids the creation of religious–governmental institutions.

State-established churches were a driving force of religious oppression in seventeenth- and eighteenth-century Europe and in the American colonies. *Engel*, 370 U.S. at 431–433. The Founders "fervently wished to stamp out" that practice, and therefore "[t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church." *Everson*, 330 U.S. at 8, 15–16. Similarly, based on the "the teachings of history," the Establishment Clause prohibits "a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end

that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies." *Schempp*, 374 U.S. at 222.

Thus, this Court has held that a state may not run a "joint public-school religious-group program." *Illinois ex rel. McCollum* v. *Board of Educ.*, 333 U.S. 203, 205 (1948). Nor may a state create a special school district specifically for one religious sect. See *Board of Educ.* v. *Grumet*, 512 U.S. 687, 690 (1994); see also *Evans*, 382 U.S. at 300 ("[A] State may not segregate public schools so as to exclude one or more religious groups."). "The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions" (*Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982)), particularly where such powers are exercised for "'explicitly religious' reasons" (*id.* at 130 (Rehnquist, J. dissenting) (quoting *id.* at 125 (majority opinion)).

Therefore, Oklahoma may not create a religious governmental entity or delegate the critical governmental function of providing free, open-to-all education to a religious entity that will impose religious dictates in fulfilling that function. Uniting "civic and religious authority" in this way is "a violation of 'the core rationale underlying the Establishment Clause.'" *Grumet*, 512 U.S. at 697 (plurality opinion) (quoting *Larkin*, 459 U.S. at 126).

The United States has a "long tradition" of religion flourishing in "the home, the church and the inviolable citadel of the individual heart and mind," not predominating in the public school or any other governmental institution. See *Schempp*, 374 U.S. at 226.

Oklahoma's establishment of a religious public school flies in the face of that tradition.

B. The Establishment Clause forbids public schools from inculcating a religion in students.

St. Isidore's religious curriculum is unconstitutional because the "[g]overnment may not * * * undertake religious instruction nor blend secular and sectarian education." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). Thomas Jefferson and James Madison—whose views on religious freedom "came to be incorporated * * * in the Federal Constitution" (*Schempp*, 374 U.S. at 214)—articulated the basis for this principle. Jefferson expressed opposition to governmental action concerning religion that could result in "some degree of proscription perhaps in public opinion." Letter from Thomas Jefferson to Samuel Miller (Jan. 23, 1808), https://bit.ly/31BeShI. He explained that official action amounting to "recommendation" of prayer, for example—even without the backing of legal force—was no "less a *law* of conduct for those to whom it is directed." *Ibid.* Similarly, Madison wrote that even a practice of governmental "recommendations only" concerning religion "naturally terminates in a conformity to the creed of the major[ity] and of a single sect, if amounting to a majority." James Madison, *Detached Memoranda* (1820), https://bit.ly/3HGs2e7.

The Founders' broad opposition to religious establishment, their respect for religious diversity, and their veneration of the personal religious conscience demonstrate that American tradition does not permit inculcation of any religion in public schools. "The design of the Constitution is that preservation and transmission of religious beliefs and worship is a

responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission." *Lee*, 505 U.S. at 589.

Given the role of public schools in American society, use of those schools to instill a particular faith in students is especially egregious. As Justice Frankfurter explained nearly seventy years ago, "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny." *McCollum*, 333 U.S. at 231 (Frankfurter, J., concurring). For that reason, "[i]n no activity of the State is it more vital to keep out divisive forces" such as those invited by "the commingling of sectarian with secular instruction." *Id.* at 212, 231 (Frankfurter, J., concurring). Thus, this Court has ruled that the "state cannot consistently with the [Establishment Clause] utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals." *Id.* at 211 (majority opinion).

This Court has repeatedly applied these principles to prohibit religious indoctrination in public schools. See *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 310–313 (2000); *Lee*, 505 U.S. at 598; *Kennedy*, 597 U.S. at 541–542 (citing *Santa Fe* and *Lee* with approval); *Edwards* v. *Aguillard*, 482 U.S. 578, 596–597 (1987); *Wallace* v. *Jaffree*, 472 U.S. 38, 61 (1985); *Epperson* v. *Arkansas*, 393 U.S. 97, 109 (1968); *Schempp*, 374 U.S. at 205; *Engel*, 370 U.S. at 424; *McCollum*, 333 U.S. at 211–212. As a public school that inculcates its students in a particular religion—including through mandatory theology classes and religious services, as well as the integration of religious doctrine in otherwise secular subjects—St. Isidore would flout these long-cherished constitutional

protections. See J.A. 18–19; Pet. App. 7a; Pet. 8; St. Isidore of Seville Catholic Virtual School, *Parent & Student Handbook 2024–2025* 27 (Mar. 18, 2024), https://perma.cc/NHP2-D5Q6.

C. *Carson*, *Espinoza*, and *Trinity Lutheran* are inapplicable.

Because permitting St. Isidore to operate as a public charter school would violate the Establishment Clause, the three principal cases on which petitioners rely for their free-exercise argument—*Carson* v. *Makin*, 596 U.S. 767 (2022); *Espinoza* v. *Montana Department of Revenue*, 591 U.S. 464 (2020); and *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449 (2017)—are inapplicable. In all three of those cases, the state involvement with the religious schools at issue would not have violated the Establishment Clause. All of those schools were private schools, not public ones. And none of them was a governmental entity or other state actor.

CONCLUSION

The judgment of the Oklahoma Supreme Court should be affirmed.

Respectfully submitted.

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